

**OPINION
66-69**

May 3, 1966 (OPINION)

Mr. Conrad J. Ziegler

State's Attorney

Pierce County

RE: Counties - County Commissioner - Vacancy

This is in response to your letter in which you set forth the following facts and ask for an interpretation and construction of the law as applied to these facts with particular emphasis on the question whether or not the office is up for election this year (1966) or if the "special" election in 1964 was for a four-year term or merely for the unexpired term of Joe Rudnick which began in January, 1963, to which he was elected in 1962.

A county commissioner, Joe Rudnick, died on April 23, 1963. He had been elected to the office of county commissioner for a four-year term in 1962 and took office in January of 1963. The county commissioners appointed his son, Theodore Rudnick, as a temporary commissioner under the provisions of section 44-02-05. In the primary election of June, 1964, Theodore Rudnick filed for the vacancy and in addition thereto a Joe Keller filed for the same office. At the November election Joe Keller received a majority number of votes. Keller qualified for the office immediately after the general election but was refused a seat as county commissioner until January on the theory that his term did not begin until then.

Section 44-02-05 of the North Dakota Century Code provides as follows:

44-02-05. VACANCY IN BOARD OF COUNTY COMMISSIONERS - HOW FILLED. When a vacancy occurs in the board of county commissioners, the remaining members of the board, with the county judge and auditor, immediately shall appoint some suitable person to fill such vacancy from the district in which such vacancy occurred. If a majority of such officers fails to agree upon a person to fill such vacancy, the county treasurer shall be called in and shall act as an additional member of such board to fill the vacancy. The appointee shall hold office until his successor is elected at the next general election and qualified."

Section 172 of the North Dakota Constitution, amongst other things, provides as is material here as follows:

* * * Said board (county commissioners) shall consist of not less than three and not more than five members whose terms of office shall be prescribed by law. * * *." (Emphasis supplied.)

The legislature did prescribe the term of section 11-11-03 of the

North Dakota Century Code, which is as follows:

TERM OF OFFICE OF COMMISSIONERS. A county commissioner shall hold his office for the term of four years except as otherwise provided in this title."

In addition to the foregoing, the legislature provided that such term shall be rotated or staggered as provided for in section 11-02-07 and repeated the rotation and staggering provision of the said terms of office in section 11-12-06 in the event the county changes to five commissioners. These provisions, particularly as to the rotation or staggering of the terms, compels the construction that the special election in 1964 was only for the unexpired term which was initially filled in the 1962 election and began in January of 1963. Consequently, the term of office is up for election in 1966. This construction will continue the rotation and staggering of the terms and in our opinion is the law on this particular question.

As to not seating the newly elected commissioner until the following January after the 1964 election, this is a moot matter now but the law suggests that the person elected at a special election to fill a vacancy takes office upon confirmation of the election, which is when the canvassing board determines the result of the election.

Petitions may be filed no earlier than July eighth and no later than July 28, 1966, for county offices in this year's election. See section 16-04-04 of the North Dakota Century Code, as amended. See also section 16-04-09.

HELGI JOHANNESON

Attorney General